

MAR 15 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-180 HENRY SMITH, et al.,

against

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-183 BERNARD SHAPIRO, et al.,

against

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-5193 NAOMI RODRIGUEZ, et al.,

against

Appellants-Intervenors,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-5200 DANIELLE and ERIC GANDY, et al.,

against

Appellants-Plaintiffs,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR INFANT APPELLANTS

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POINT I

The Court below did not, in this case, have the power to declare state laws unconstitutional or to prescribe the procedures to be followed in a state proceeding.

The brief for the Appellees ("Foster-Parents") seeks to buttress the decision of the Court below on grounds other than, and to an extent contrary to, those on which

the decision rests. The Foster-Parents argue that the disruption of a foster child's relationship with foster parents is a withdrawal of the right to a continuing benefit conferred by state law and an interference with the Constitutional right to a continuance of the relationship. (Brief for Appellees, Organization of Foster Families, etc., pp. 36-52)

The District Court did *not* decide the Foster-Parents' claim that their relationship with foster children is entitled to constitutional protection (App. J.S. 9a, 8a).^{*} And the Court rejected the Foster-Parents' claim of a statutory right to the continuance of the foster parental relationship. Under New York statutes and regulations, the relationship between foster-parent and foster-child is a temporary one, terminable at any time that a Public Welfare District or an agency acting for it deems a termination in the best interest of the foster-child. (App. J.S. 8a) The District Court stated it was "unpersuaded" by the Foster-Parents' argument that their "open-ended relationship" with their foster-children was "one of indefinite duration". (App. J.S. 8a)

The Court below held New York Social Services Law §§ 383(2) and 400 and 18 NYCRR 450.14 unconstitutional because they permitted "precipitous" decisions to remove children from foster homes without due process hearings. The consequence of an improvident separation from a foster home, the Court found, may be detrimental to the child involved. (App. J.S. 10a, 11a) The right vindicated by the District Court was the right of foster children to a due process hearing to minimize the possibility of arbitrary or misinformed action. (App. J.S. 10a)

It is clear from the District Court's findings, that it did not have jurisdiction to declare the state statutes uncon-

^{*} The abbreviation "App. J.S." refers to the Appendix to the Jurisdictional Statements. The general Appendix is referred to as "App."

stitutional or to direct the conduct of a particular kind of hearing before a child may be removed from a foster home. This action was brought pursuant to the Civil Rights Law, 42 U.S.C. 1983, to redress the alleged impairment of statutory and constitutional rights by the New York State government and its agencies. (App. 14a) To establish a cognizable claim under the Civil Rights Law, there must be a deprivation of right created by statute, or of a constitutional right other than the right to procedural due process. Jurisdiction attaches when, in the language of the statute, there has been a deprivation under color of statute "of any rights, privileges or immunities secured by the Constitution and laws". The Court below did not find that there had been a deprivation of any right or immunity other than the right to procedural due process. The right to procedural due process cannot be invoked in an action such as this, unless it is to preserve an independent constitutional right or to secure a statutory right or benefit. *Paul v. Davis*, 424 U.S. 693.

As the District Court held in the case at bar, there is no statutory right to the continuance of a foster family relationship (App. J.S.), and the Court did not find that there was a constitutional right to a continuance of the relationship (App. J.S.). The Court also found there was nothing to justify the expectation that under existing procedures, the relationship (whether or not there was a right to its continuance) might be "abruptly and summarily terminated". (App. J.S. 8a) The only right to which foster children were found entitled by the Court below is the right to a fair hearing to insure that there will not be "capricious movement" of a foster-child (App. J.S. 11a). Such hearing, the District Court held, "performs the salutary function of providing . . . an organized forum in which to gather information . . .". (App. J.S. 12a) The Court disavowed any intent to interfere with the ultimate decision with respect to removal of a child. It directed a due process hearing only to enable "the state in its *parens patriae* capacity . . . to make an informed decision after

a hearing at which all relevant information has been presented." (App. J.S. 12a)

When the sole question involved is the right to procedural due process, and it is not invoked to vindicate or sustain some other right or privilege, relief if any is available, must be obtained in the State Courts. (Some of the foster-parents resorted unsuccessfully to their State Court remedies before bringing this action in the Federal District Court.) In *Paul v. Davis*, 424 U.S. 693, the Respondent Davis had been accused wrongfully of shoplifting in a pamphlet issued by a city and county police department. Davis had not been convicted of the charge when the pamphlet was circulated, and the charge against him was thereafter dismissed. Davis brought action in the Federal District Court claiming he had been deprived of "liberty" and "property" without due process. This Court, wrote, in holding that Davis had not stated a claim for relief in the federal court:

"Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 700-701

"This conclusion is quite consistent with our most recent holding in this area, *Goss v. Lopez*, 419 US 565 . . . , that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, 419 U.S. *id.* at 574-

575 it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right." (emphasis ours) 424 U.S. at p. 710.

This Court after discussing a number of cases, in its opinion in *Davis* (including others relied on in the brief of the Foster Parents), added:

"In each of these cases, as a result of the state action complained of a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. (emphasis ours) 424 U.S. at p. 711.

"Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." (Emphasis ours) 424 U.S. at p. 712.

In the instant case, as noted before, the District Court did not find that any "right or status previously recognized by state law"* or by the Constitution, was affected, endangered or threatened by the alleged failure of the State to afford procedural due process in proceedings to remove children from foster care. The Court found only

* *Paul v. Davis*, 424 U.S. at p. 711.

that due process procedures were necessary to enable the State, through its agencies, to reach an informed decision with respect to removal of a child from a foster home. The District Court does not have authority to declare a law unconstitutional, or to dictate the procedures to be followed by a state agency, in a case that does not involve the denial or threat of denial of any right or benefit. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 2d 60; *United States v. Raines*, 362 U.S. 17, 20-21; *Paul v. Davis*, 424 U.S. 693.

POINT II

The Foster Parents (appellees) do not have standing to advance the arguments presented on behalf of the infant appellants in their brief.

As stated before, the Foster-Parents maintained in the District Court that they had a Constitutional right or "liberty" in, and a statutory right to, a continued relationship with Foster Children in their care. The District Court declined to rule upon the one claimed right and denied the other. The Foster-Parents did not appeal from that judgment.

In their brief, the Foster-Parents again assert the existence of their alleged Constitutional and statutory rights and maintain they have the right to assert them as advocates for the Children.* The District Court rejected the claim that there is an "identity of interest between foster parent and foster child" and for that reason appointed the attorney submitting this brief as counsel for the infant plaintiffs. (App. J.S. 14a) The Foster-Parents conclude that the Court, by refusing to permit them or their counsel

* Appellees quote a twelve year old child as seeking the relief requested (Appellee's Brief at p. 76) but fail to advise the Court that she returned voluntarily to the home of her natural mother and is living there happily with her sisters. (See Affidavits appended.)

to represent the children,***** "conferred upon them" the task of presenting arguments for the children. (Appellees' Brief, p. 83) Two reasons for the general rule that a party may not assert the rights of another before this Court (*Barrows v. Jackson*, 346 U.S. 249, 255; *McGowan v. Maryland*, 366 U.S. 420, 429) are: the holders of the rights may "not wish to assert" the rights asserted and are "the best proponents of their own rights". *Singleton v. Wulff*, — U.S. —, —, 49 L.Ed. 2d 826, 833. Both reasons apply in this case.

The Foster-Parents will, of course, benefit from the Court's recognition of the alleged rights they assert for the children. As they state in their brief,* they, the foster-parents, have a pecuniary interest in keeping foster children in their care.** But they cannot assert standing to advance claims on behalf of the children unless the children's interest will also be advanced. *Craig v. Boren*, — U.S. —, —, 50 L.Ed. 2d 397, 405. Counsel for the children, whose appointment was continued after her views were made known to the courts, is convinced, as is the New York Legislature,*** the Association of Family Court Judges of New York City and a number of organizations formed to protect children**** that the period of foster-care should be shortened whenever consistent with the best interests of foster children and should be terminated without unnecessary delay when children are to be returned to a

* Brief for Appellees, p. 86.

** They also claim a professional interest as foster parents licensed by the state. Brief for Appellees, p. 86.

*** New York Social Services Law §§ 384b(1)(a), 384b(1)(b).

**** Pp. 1a, 2a Appendix to Brief for Infant Appellants.

***** The Foster-Parents attempted unsuccessfully in the District Court (on two occasions), in the Court of Appeals and in this Court, to have the writer of this brief relieved because her views with respect to the children's best interests were opposed to those of the Foster-Parents.

permanent home,—to their fit parents or to adoptive parents. (There is, of course, nothing to prevent foster parents from seeking to adopt children placed with them.)* Counsel designated to speak for the children also believes that the open contest mandated by the District Court each time a child is to be removed from a temporary foster-home, is more lacerating to the sensibilities of the child than the existing state procedures.

Respectfully submitted,

HELEN L. BUTTENWIESER, Esq.

On the brief

EPHRAIM LONDON, Esq.

FRANCIS L. VALENTE, JR., Esq.

* The following testimony of Christiane Goldberg one of the Appellees in the Court below was revealing:

Q. If Rafael were free for adoption, would you be willing to adopt him? A. He is not free yet.

Q. I said if Rafael were free for adoption. A. I don't know. He has his own identity. We wish to respect his identity, his past, his sense of belonging to where he comes from.

[136] Q. So if the agency were to undertake to free Rafael for adoption, assuming for the minute that he isn't free, would you be willing to assist the agency— A. No, I don't think he should be cut off from his original family.

APPENDIX

Affidavit of Mary Jane Brennan.

Index No. 12275-74

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

STATE OF NEW YORK ex rel. PATRICIA A. WALLACE, etc.,

Petitioner

—against—

GEORGE LHOTAN et al.,

and

JOSEPH D'ELIA, as Commissioner of the Department of
Social Services of the County of Nassau,

Respondents

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

MARY JANE BRENNAN, being duly sworn, deposes and says:

1. That I am the Director of Services to Children, Nassau County Department of Social Services.

2. That I am familiar with the present matter involving Cheryl Wallace.

3. Foster Care is a system which cares for children in approved foster homes or authorized facilities when

Affidavit of Mary Jane Brennan.

children are unable to live with their own families and has as its ultimate goal, the return of child or children to the natural parents. The Department directs its efforts toward that end, that is, the return of the child to its parents if at all possible.

4. On April 9, 1976, the four Wallace girls were returned to the Department, pursuant to the Order of the Court of Appeals of the State of New York, which had affirmed the lower court decision sustaining the natural mother's application for the return of her children. The two young girls, Kathleen and Cynthia, were returned to their mother on 4/9/76 and the two oldest girls, Cheryl and Patricia, were placed in an interim foster home in order to prepare for the return to their natural mother, within a six month period.

5. The two younger girls hereinbefore mentioned, readily assimilated themselves into their mother's home and according to observations of qualified caseworkers, were happy at home with their two younger brothers, John and William Wallace. The two older girls, Cheryl and Patricia, were placed in the certified foster home of Mr. and Mrs. DiStefano. Mrs. DiStefano, the foster mother, responded to the girls in a motherly and positive fashion. The DiStefanos understood and accepted that plans for the two girls were geared for their eventual return to their natural mother.

From the outset of their placement with the DiStefanos, the girls received and made telephone calls to various adults. These contacts culminated in the girls' running away from the foster home on June 5, 1976. During their absence from the foster home, the girls were given shelter, food and clothing. They were assisted in their efforts to conceal their whereabouts from this Department and the natural mother. Eventually, legal proceeding directed at

Affidavit of Mary Jane Brennan.

one of the aforementioned adults resulted in the girls being delivered to the Nassau County Police Department who turned them over to the Department of Social Services. Cheryl and Patricia were again returned to the DiStefano foster home.

6. Apparently the running away had a great impact on the girls. Within two weeks after their return to the DiStefano foster home, Patricia agreed for the first time to visit with her mother, sisters and brothers. She told the caseworker that she had begun to realize that her mother had been fighting for her and really wanted her contrary to the information Patricia had received from other adults. Patricia visited with her family over several weekends and on June 21, 1976, while on a week-end visit, subsequently informed the caseworker that she wished to remain permanently in her mother's home. On June 24, 1976, Patricia Wallace did return to her mother where she has happily resided to the present time.

7. Following Patricia's return home, Cheryl began to view her mother's actions in fighting for her custody in a positive light and began seriously to question the actions of her former foster parents, one of the respondents herein. As indicated in the Affidavit of caseworker Eileen Stone submitted herewith, Cheryl then made rapid progress toward being reacquainted with her family. She requested regular visitation with her family, including Thanksgiving, and on December 16, 1976, Cheryl Wallace advised her mother of her desire to return home. January 7th was selected as the date of return, thus allowing Cheryl time to say goodbye to the friends and schoolmates she had acquired while living in the DiStefano home. Thus, on January 7th, Cheryl was returned to her mother.

8. The primary goal for which Foster Care is intended has been realized in this situation. Excellent casework

Affidavit of Mary Jane Brennan.

and follow-up, as well as careful and skillful attention by the casework staff, was responsible for the reunion of the Wallace family. It is the aim of this Department to reunite children with their natural families whenever possible and to make the stay in foster care of as short a duration as is feasible depending upon the needs of the child and his family.

The reuniting of this family reflects the planning and cooperation of many parties and particularly emphasizes the sensitive and crucial role of foster parents. Whereas the former foster parents provided for the physical and material needs of the children, they thwarted efforts to reunite the children with their mother, thus prolonging the time these girls spent in the foster care system. The DiStefanos, in addition to meeting the physical and material needs of the Wallace girls, also supplied the vital ingredient, a positive attitude toward the natural mother and the family unit. In the short period of nine months, this attitude on the part of the foster parents, together with the efforts of the Department, prevented the permanent separation of Cheryl and her family and, in fact, did bring this family together. When the girls were permitted to see their mother with their own eyes and to make their own assessments without being influenced by others, the natural bond of affection which existed between parent and child was rekindled and is now flourishing.

(Sworn to by Mary Jane Brennan, January 18, 1977.)

Affidavit of Eileen Stone.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 12275-74

STATE OF NEW YORK ex rel, PATRICIA A. WALLACE, etc.,
 Petitioner,
 —against—

GEORGE LHOTAN et al.,

and

JOSEPH D'ELIA, as Commissioner of the Department of
 Social Services of the County of Nassau,

Respondents.

STATE OF NEW YORK }
 COUNTY OF NASSAU } ss.:

EILEEN STONE, being duly sworn, deposes and says:

1. That I am an employee of the Department of Social Services, County of Nassau, State of New York.

2. That I am a caseworker assigned to Unit #76, Children's Services, and that I am the Caseworker assigned to Cheryl Wallace and her foster family, Mr. and Mrs. DiStefano.

3. I initially met Cheryl Wallace on April 9, 1976, and have seen her on an average of twice monthly. Initially, Cheryl was hostile, antagonistic, moody and withdrawn. Her negative attitude was directed towards the Department of Social Services and the DiStefanos.

Affidavit of Eileen Stone.

In addition, Cheryl, who formerly had been an excellent student, was now performing poorly in her new school in West Islip. She expressed no interest in school, failed to do her homework assignments and displayed a non-caring attitude. She was apathetic towards the planning of her program for the September 1976 school year. Her attitude of defiance and unresponsiveness persisted despite all my efforts and those of the foster mother.

4. In June 1976, Cheryl's sibling, Patricia, decided to return to her mother's home and it was at this time that Cheryl's attitude began to change. Over the Summer, Cheryl's attitude towards the foster parents changed; when school began her interest increased, and she subsequently became a cooperative pleasant child and participated in family activities. In addition, contact with the West Islip School, which she attends, on October 20, 1976, indicated that she is an "excellent" student.

5. During the period of my visits with Cheryl, I have noted a very definite positive change in her attitude. On September 14, 1976, a birthday party for Cheryl was held in her West Islip home and her sisters were present. Cheryl was relaxed and happy and related pleasantly to her sisters and to me. The party was a success and her sisters felt that Cheryl was "changing".

6. On October 17, 1976, Cheryl spent the day with her mother and siblings in Long Beach while celebrating Patricia's birthday. Mrs. Wallace's sister and brother were also present. Cheryl told me that she had a great time and enjoyed meeting her relatives. In addition, Cheryl now refers to Mrs. Wallace as "mother". Cheryl further indicated at that time that she would again like to spend another day visiting with her family in Long Beach.

Affidavit of Eileen Stone.

7. In October 1976, Cheryl told me of her decision to remain in the DiStefano foster home for the next six months so that she might have time to decide about her future.

8. On 10/29/76, Cheryl again spent the day visiting her mother and her siblings, at her mother's home in Long Beach. At the conclusion of the visit, she again requested further visits and plans were made for same. She subsequently visited with her mother for weekends and for a week during the periods of November through December and the beginning of January 1977, and on January 7, 1977, she returned to live with her mother on a permanent basis, as a result of a request made by Cheryl to your affiant. Cheryl displays a great deal of affection to her mother which has been observed by your affiant.

9. Cheryl is now residing with her mother and her siblings and has requested counselling to help her through her adjustment period. Mrs. Wallace has indicated her willingness to cooperate to the fullest extent. Attached hereto is a letter from the Community Mental Health Division of the Babylon Mental Health Clinic, which indicates Cheryl's positive attitude in her relationship with her natural family.

10. For the first time in the Agency's experience with Cheryl, even prior to the termination of the prior foster parents' relationship, Cheryl now seems far happier, content and sociable than through the entire periods of her placements.

(Sworn to by Eileen Stone, January 18, 1977.)

Affidavit of Eileen Stone.

SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES
COMMUNITY MENTAL HEALTH DIVISION
LEWIS KURKE, M.D., DIRECTOR

January 10, 1977

Re: Wallace, Cheryl

Mrs. Irene Stone
Department of Social Services
900 Ellison Avenue
Westbury, New York 11790

Dear Mrs. Stone:

In accordance with your request, we are submitting the following information regarding Cheryl Wallace.

Since our last contact, Cheryl appears to have gained a great deal of insight into her relationship with her mother. She had a very good Thanksgiving with her mother and family and felt they all, "really care." She began to develop some very positive feelings about her mother and was seriously considering returning home and felt she could handle the situation.

As Cheryl's attitude toward her natural family began to modify, there were some positive changes in her personality. She was more relaxed and outgoing in treatment as she began to see her own role in relationship to her natural family.

In the event that Cheryl should return home and in spite of the gains gotten in treatment, it is our feeling that Cheryl should maintain a therapeutic relationship on an out-patient basis at a clinic near her home. I suspect family treatment would be very beneficial once Cheryl returns to her natural mother.

I trust this above information will be helpful to you in planning for Cheryl.

Sincerely,

LEONARD CHAFETZ
Leonard Chafetz, CSW
Clinic Administrator

Affidavit of Diana Clingan.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 12275-74

PATRICIA WALLACE, et al

VS

LHOTAN

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

DIANA CLINGAN, being duly sworn, deposes and says:

1. That I am an employee of the Department of Social Services, County of Nassau, State of New York.
2. That I am a caseworker assigned to Unit #73, Children Services and I am the caseworker who is familiar with and service Patricia Wallace and her five children.
3. That Cynthia Wallace and Cathleen Wallace were returned to their natural mother as per the order of the Hon. Bernard F. McCaffrey, dated November 5, 1975. The two aforementioned children have adjusted extremely well in their mother's home and are now fully integrated in the home and display affection with their mother.
4. Patricia Wallace, the thirteen year old daughter, returned to her mother's home, on her own volition, on June 24, 1976 and she too has made an excellent adjustment.

Affidavit of Diana Clingan.

She has advised your deponent that she is happy being home with her mother and her siblings. She is performing well academically, according to her Guidance Counselor at the Long Beach Junior High School.

5. Homemaker services which were provided as per the Court's direction, were terminated on September 10, 1976, as Mrs. Wallace has adjusted well to the return of her children, is managing very well without the aforesaid homemaker services.

6. On October 6, 1976, your deponent paid a routine call to the Wallace home and all the children appeared to be happy and well taken care of. In addition, I have had occasion to observe Mrs. Wallace in her role of homemaker and it is your deponent's feeling that Mrs. Wallace is performing in an excellent manner as a homemaker and a mother to the five children she now has with her. In addition, I have noted displays of affection by all of the children at diverse times to their mother.

(Sworn to by Diana Clingan, October 21, 1976.)